No. 14,592

IN THE

United States Court of Appeals

For the Ninth Circuit

WALLACE HIGA, Administrator of the Estate of Takeichi Higa,
Appellant,

vs.

TRANSOCEAN AIRLINES, a corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF OF TRANSOCEAN AIR LINES, INC., APPELLEE.

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Upon Appeal from the United States District Court for the District of Hawaii.

BRIEF OF TRANSOCEAN AIR LINES, INC., APPELLEE.

STATEMENT OF THE CASE.

This appeal is by Wallace Higa, plaintiff and appellant, from an order of the trial court granting the motion of Transocean Air Lines, Inc., defendant and appellee, to dismiss an action filed on the "law side" of the court, on the ground that the court lacked jurisdiction of the matters alleged in the complaint. As stated by appellant in his "statement of the case", the case was decided on the pleadings.

Appellant's summary of the allegations of the complaint is essentially correct.

SUMMARY OF ARGUMENT.

The issue involved.

The sole issue involved is the proper construction of Section 1 of the Death on the High Seas Act: do actions thereunder lie exclusively in admiralty?

The text and legislative history.

The plain words of the Act show the exclusive remedy is in admiralty. This is confirmed by the legislative history.

The authorities discussed.

The most exhaustive discussion of the question at issue is to be found in *Wilson v. Transocean Air Lines.* As there pointed out, the early cases all held the action lay exclusively in admiralty. In 1938 there arose a line of New York State cases, beginning with *Elliott v. Steinfeldt,* the reasoning of which is shown to be erroneous. Likewise erroneous is the reasoning in the *Choy* case, the first Federal decision permitting an action at law. The latest case from New York, *Iafrate v. Compagnie Generale Transatlantique, etc.,* repudiates these decisions.

All the decisions in this Circuit, including an early opinion of this Court, the *Silverpalm,* and several recent decisions of local District Courts hold the action lies exclusively in admiralty.

The argument based on the word "may" is a false issue.

The option conferred by the statute is an option to sue, not an option as to where suit may be brought. This is confirmed by other sections of the Act, and

by related statutes. The cases relied on by appellant are shown to be not in point.

The "saving to suitors" clause is in no way involved.

The "saving to suitors" clause merely preserves other remedies already existing. No remedy other than the Federal Act exists in this case. The "saving" clause is therefore not involved.

Appellant's cases discussed and shown not to be in point.

Conclusion.

The judgment of the trial court should be affirmed.

ARGUMENT.

I.

THE ISSUE INVOLVED.

In his opening brief, appellant specified some four alleged errors upon which he relies on this appeal. Upon examination, these four specifications of errors are seen to be essentially identical; that is, in substance they all complain of the action of the trial court in ruling that an action founded upon the Death on the High Seas Act (46 U.S.C.A., para. 761-767) must be commenced and prosecuted in admiralty, and that there is no jurisdiction in the court, sitting on the "law side", to entertain such an action.

It is appellee's position that the trial court's ruling was correct, that is, that an action based on the Death on the High Seas Act must be commenced in

admiralty. It is appellant's position, apparently, that this Act simply creates a cause of action and "sets it at large", and that it may be enforced in any court of general jurisdiction, including State courts and the "law side" of the Federal Court.

Appellant seeks to support his position in some three ways:

(1) by the citation of authority to the effect that State courts, or the law side of Federal courts, have jurisdiction to hear Death on the High Seas Act cases (Appellant's Opening Brief, pp. 11-15);

(2) by the argument that the words "*may* maintain a suit for damages in the district courts of the United States, in admiralty" are purely "permissive", not "mandatory", and thus do not forbid maintaining such action in a State court or on the law side of a Federal court; in this connection, appellant argues that a grant of jurisdiction (in this case to the Federal Court in admiralty) should not be construed as exclusive "by implication only" (Appellant's Opening Brief, pp. 11-20);

(3) by the argument that the "saving to suitors" clause (28 U.S.C.A. para. 1333) in the Judicial Code in some way grants appellant the right to bring an admiralty cause of action in a State court or on the law side of a Federal court (Appellant's Opening Brief, pp. 6-11).

Appellee believes that two of the above propositions, namely, (2) and (3), are false issues, and represent a basic confusion in appellant's mind in this case, a confusion perhaps responsible for this appeal.

We submit that there is simply one issue in this case, the proper construction of Section 1 of the Death on the High Seas Act (46 U.S.C.A., Sec. 761), and in particular the construction of the language "may maintain a suit for damages in the district courts of the United States, in admiralty . . ." The issue is: does this Section both create a cause of action and delimit the forum in which it may be enforced, or does it simply create a cause of action and "set it at large", to be enforced in any court of general jurisdiction in which plaintiff chooses to sue? This is purely a question of statutory construction. There can be no question that Congress, in creating the cause of action, *could* have limited its enforcement simply to the admiralty courts; likewise, there can be no question that Congress, had it so wished, *could* have authorized the enforcement of the cause of action so created in any court of competent jurisdiction. The question is: what *did* Congress do? We submit that the language of the statute, its legislative history, the better reasoned cases construing the statute, and all pertinent analogies from other statutes demonstrate conclusively that Congress intentionally and expressly limited the enforcement of the cause of action so created to the admiralty courts.

II.

THE LANGUAGE AND LEGISLATIVE HISTORY OF THE ACT DEMONSTRATE THAT IT CREATES A RIGHT OF ACTION WHICH LIES EXCLUSIVELY IN ADMIRALTY.

It is rather strange, in view of the plain wording of the Act, that there could have been any doubt that the cause of action created by it lies exclusively in Admiralty. The first section of the Act (46 U.S.C.A. Section 761) provides:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia or the Territories or dependencies of the United States, the personal representative of the decedent *may maintain a suit for damages* in the district courts of the United States, *in admiralty,* for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." (Emphasis added.)

Before the Act was enacted no right of action for death occurring on the high seas existed. The Act created the right of action, which did not exist before, and attached certain limitations upon the right so created. By elementary principles, the cause of action so created exists and may be prosecuted only in conformity with the conditions and limitations set forth in the statute creating it. The Act states that "the personal representative of the decedent may maintain a suit for damages in the district courts of the United

States, in admiralty . . ." If plain English is to be given effect, this means the action must be maintained in Admiralty.

The clear meaning of the plain words of the Act is confirmed if we look at its Congressional history. The Act, enacted on March 30, 1920, was passed by the House of Representatives on March 17, 1920. The discussion in the House on that day concerning this bill is to be found in the Congressional Record, Volume 59, Part V, pages 4482 through 4487. We particularly call to the attention of the Court the following excerpted passages:

> "Mr. Igoe. Does not the gentleman think that he should inform the gentleman from Ohio (Mr. Ricketts) that *this proceeding will be in admiralty* and that there will be no jury, so that no Member of the House may have any misunderstanding about it? That question was thrashed out and it was decided best not to incorporate into this bill a jury trial *because of the difficulties in admiralty proceedings.*" (Page 4482. Emphasis added.)

> "Mr. Moore of Virginia. . . . The purpose of this bill, as I understand it, is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas.
>
> Mr. Volstead. That is it.
>
> Mr. Moore of Virginia. If that be true, if you give exclusive jurisdiction, there seems to be no necessity for at least a part of Section 7, and it therefore appears that in order to remove any doubt as to the exclusive jurisdiction of the admiralty courts, if that is what is desired, that there shall be inserted in section 1 language that

will make the exclusive jurisdiction of the admiralty courts clear.

The courts may take the view that as the bill deals with accidents on the high seas and also with accidents within the territorial limits of the States, that even as to causes of action arising on the high seas the admiralty courts and State courts are to have concurrent jurisdiction. If that view is to be avoided, it strikes me that there could be placed easily in the first section of the bill language that would place the point beyond peradventure of a doubt. I have only seen the bill in the last few moments, and am only stating an impression.

Mr. Montague. May I suggest——

Mr. Volstead. I yield to the gentleman.

Mr. Montague. In reply to the statement of my colleague (Mr. Moore) I will say that jurisdiction upon this subject is found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such a law is exclusive. It requires no asseveration in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive.

Mr. Volstead. My impression is it would be exclusive upon the theory the gentleman (Mr. Montague) suggests." (Page 4483.)

"Mr. Dewalt. In order to remove any doubt as to that, does not the chairman of the Commit-

tee on the Judiciary believe it would be wise, in section 1, to state that the admiralty courts of the United States do have exclusive jurisdiction in such cases? That would clear that down.

Mr. Volstead. The view taken by the parties who drew this bill is that *it is exclusive,* because, as the gentleman from Virginia (Mr. Montague) pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject." (Page 4485. Emphasis added.)

"Mr. Montague. This bill has been killed three or four times in other Congresses on three grounds: One, that it embraced the Great Lakes and inland waters; the second, that it did not provide for a jury trial; third, that there was no limitation upon the liability of shipowners, and that there ought to be such a limitation. These three objections, in some form or another, have been interjected heretofore to kill this very meritorious legislation. This bill as now worked out is not perfect, and no legislation is perfect, but certainly in the minds of the committee it is legislation that we would generally consider most wholesome and righteous for mankind. (Applause.)" (Page 4486.)

See also the Committee Reports: Senate Report 216, and House Report 674, 66th Congress.

III.

THE CASES IN THIS CIRCUIT AND THE BETTER REASONED CASES ELSEWHERE CONFIRM THAT THE ACTION LIES EXCLUSIVELY IN ADMIRALTY.

The decision of the courts upon this question (that is, do suits under the Act lie exclusively in admiralty) have developed into two lines of authority—one line finding that they do, the other that they do not.

By far the most thorough and scholarly discussion of this entire question is to be found in the opinion of Judge Goodman in the case of *Wilson v. Transocean Airlines,* April 15, 1954, 121 Fed. Supp. 85, at pp. 93-98, dealing with this very question in a case arising out of the same accident as here involved. This opinion deals so cogently with the various arguments urged by appellant in his Opening Brief, and is so valuable a contribution to the subject, that we have reprinted the relevant portion as an Appendix to this brief. See Appendix.

As Judge Goodman points out in his opinion, the earliest cases stated categorically that the suit must be in admiralty. See *Dall v. Cosulich Line,* 1936 A.M.C. 359 (S.D.N.Y. 1928); *Birks v. United Fruit Co., Inc.,* 48 Fed.(2d) 656 (S.D.N.Y. 1930); *Echavarria v. Atlantic & Caribbean Steam Nav. Co.,* 10 Fed. Supp. 677 (E.D.N.Y. 1935); *The Mohawk,* 1938 A.M.C. 396 (Surrogates' Court of Kings County New York 1938).

Thus, in *Birks v. United Fruit Co., Inc.* (1930) U.S. Dist. Ct., S.D.N.Y., 48 Fed.(2d) 656, an early case to consider the question, the court granted de-

fendant's motion to dismiss a complaint as not sufficient on any of a number of theories. As if stating a a self-evident proposition, the court said: "It cannot be regarded as having been brought under the Death on the High Seas Act, Section 1 (46 U.S.C.A., Section 761) because the action is at law". (Page 656.)

The next court to consider the subject felt the answer so clear that it need cite only the language of the act. See *Echavarria v. Atlantic and Caribbean Steam Nav. Co.* (1935) U.S. Dist. Ct., E.D.N.Y., 10 Fed. Supp. 677, where the court dismissed an action brought on the law side of the United States District Court, simply referring to the language of the statute.

In 1938, however, (some eighteen years after the Act was enacted) a New York State court in *Elliott v. Steinfeldt,* App. Div. 1938, 4 N.Y. Supp.(2d) 9, reversing the trial court, held, in a brief memorandum opinion, that State courts had concurrent jurisdiction to enforce this cause of action, stating ". . . the right to maintain the action in the state courts, which had long existed under the Judiciary Act of 1789 was not necessarily affected by the Federal statute." The court sought to distinguish the *Echavarria* case as holding only that the Federal law superseded State law as to the *substantive* rights of the parties, but not passing on the question of the proper forum. As Judge Goodman points out in his opinion, the basic premise of the New York court was erroneous: State courts had *never* enjoyed jurisdiction to enforce the *Federal* right of action; only State rights of actions had been enforced, and these only in a few cases. In

addition, the court misconstrued the *Echavarria* case, in which, as pointed out above, a common law action, purportedly based on the Act, was *dismissed—because* not commenced in admiralty.

The *Elliott* case was followed, without further consideration or independent reasoning, in several subsequent New York State cases.[1]

Only three Federal cases have ever held that a suit might be maintained at law under the Death on the High Seas Act. Appellant relies heavily upon the first of these, *Choy v. Pan American,* U.S. District Court, S.D.N.Y. 1941, 1941 Aviation Reports 10, 1941 A.M.C. 483 (not officially reported). As appellant's lengthy quotation shows,[2] Judge Clancy in that case relied on the supposed analogy of the decision of the Supreme Court in *Panama R. R. Co. v. Johnson,* 1924, 264 U.S. 375, construing the Jones Act, enacted at the same session of Congress as the Death on the High Seas Act. Judge Clancy also adverted to the use of the word "may" in the statute and argued it should not be construed to mean "shall". (This argument, heavily relied upon by appellant here,[3] will be discussed at length below.)

In the *Panama R. R. Co.* case, the Supreme Court stated that the right of action given seamen by the Jones Act might be enforced in admiralty, although that act merely provided that the right of action might be maintained in a suit at law.

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[1]Cited in Appellant's Opening Brief, at p. 15.

[2]At pp. 12-14 of his Opening Brief.

[3]At pp. 16-18 of his Opening Brief.

As Judge Goodman so convincingly shows (121 Fed. Supp. 85, at 96-97) the two situations are not in fact analogous. The Supreme Court's interpretation of the Jones Act was admittedly governed by the desire to avoid, if possible, a grave constitutional question; no such question is present in this case. Likewise, there is a great difference between: (1) the proposition that, in view of the ancient and traditional jurisdiction of the admiralty courts for maritime torts and wrongs, a statute which expressly creates a new maritime cause of action together with a right to a common law trial, also contemplates that said right of action may be enforced in admiralty, the traditional forum; and, on the other hand, (2) the very different proposition that a statute which in terms authorizes only an admiralty proceeding for a maritime wrong, contemplates a common law remedy which previously did not exist.

Lastly, Judge Clancy notwithstanding, it does not seem in any way "anomalous" to hold that under the Jones Act and the Death on the High Seas Act, "seamen had a common law action for death and other victims of injuries on this same ship had not" where the very same Congress had, in the Jones Act, expressly provided for a right of action at law, and, in the Death on the High Seas Act, had omitted any such provision but instead provided only that claimants "may maintain an action . . . *in admiralty.*" Rather, the strikingly different language used by the same Congress suggests that Congress had the problem very much in mind, and intended different results to flow from this very different language.

In *Batkiewitz v. Seas Shipping Co.,* 1943, U.S. Dist. Ct., S.D.N.Y., 53 Fed. Supp. 802, the court relied upon *Elliott v. Steinfeldt* and the *Choy* case in granting a motion to amend a complaint to add a cause of action under the Death on the High Seas Act in an action brought at law under the Jones Act; it is significant that under the facts of that case, had the court denied leave to amend, plaintiff's action under the Death on the High Seas Act would have been barred by the statute of limitations.

The third case, *Sierra v. Pan American World Airways, Inc.,* U.S. Dist. Ct., Puerto Rico, 1952, 107 Fed. Sup. 519 (in which the judge in passing erroneously stated that diversity of citizenship as well as a "Federal right of action" were necessary for jurisdiction) merely relied on the prior decisions.

The remaining cases cited by appellant[4] are not in point. *Bugden v. Trawler Cambridge, Inc.,* Sup. Jud. Ct. of Mass., 1946, 65 N.E.2d 533, as shown by Judge Goodman, did not involve even dictum in support of appellant. *Powers v. Cunard S.S. Co. Ltd.,* 1925, 32 Fed.(2d) 720, and *The Saturnia,* 1946 A.M.C. 469 (U. S. District Court S.D.N.Y. 1936) involved rights of action created by *foreign law,* and did not involve a right of action created by Section 1 of the Death on the High Seas Act, the section here in question.

Thus, as Judge Goodman demonstrated, only eight decisions, five in the State courts of New York and three Federal cases (two in the Southern District of

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[4]At p. 15 of Appellant's Opening Brief.

New York), hold that the action may be maintained at law, and of these eight, only *two* are based upon independent reasoning. It is highly significant that, except for the *Sierra* case, arising in Puerto Rico, this line of authority appears never to have been followed outside of New York. It is further most significant that the latest case from New York dealing with this question, *Iafrate v. Compagnie Generale Trans-Atlantique,* U.S. Dist. Ct., S.D.N.Y., 1952, 106 Fed. Supp. 619 expressly refused to follow these cases but instead held that the Act *meant what it said,* that is, that the suit must be commenced in admiralty.

The cases in this Circuit are unanimous in this result. The earliest and most important case, though factually distinguishable, is *The Silverpalm,* 1935, CCA-9, 79 Fed.(2d) 598, a unanimous decision of this Court on an appeal from the United States District Court for the Northern District of California, Southern Division. In that case certain United States Naval officers were killed in a collision between a United States naval vessel and a British ship, the Silverpalm. The personal representatives of the officers filed a libel in admiralty against the ship. The shipping company then filed a petition to limit liability, and the District Court issued an injunction enjoining all further suits and further action in pending suits. The personal representatives then moved the court to modify the injunction to permit them to proceed against the shipping company, and the District Court so ordered, authorizing the administrators to "file suit in personam at law". On appeal, this Court

rather shortly pointed out (at page 600) that "46 U.S.C.A., Section 764, supra, permits suits under foreign law for such deaths only to be 'maintained in an appropriate action in admiralty' ". The Court then criticized the District Court for failing to make findings which in the words of the Court of Appeals:

> ". . . quite likely would have suggested to it the distinction between a cause of action based on the British statute, concerning which its decision might have permitted a suit otherwise than in the limitation proceeding, *and a cause of action arising from the United States Statute which* at that stage in the litigation, at any rate, *should have been confined* to the limitation proceeding and, *in any event,* for death caused on a United States naval vessel outside state territorial jurisdiction, *in admiralty.* Furthermore, in a case of first impression, involving the important question here presented, the writing of an opinion in accordance with the long-established practice in admiralty in this district *would have concentrated the mind of the court on the terms of the United States death statute involved,* with its provision that whatever rights the foreign law may confer are to be 'maintained in an appropriate action *in admiralty.*' " (Page 600; Emphasis added.)

The *Silverpalm* case was relied upon by Judge Wiig, the trial court in this case, in his opinion granting appellee's motion to dismiss. (See Tr. p. 18, at line 22.)

The District Courts in this Circuit have likewise unanimously reached this result, all in cases arising out of the very accident here involved. See the opin-

ion of Judge Goodman, previously referred to, in *Wilson v. Transocean,* 121 Fed. Supp. 85; and the opinion of Judge Wiig in *Higa v. Transocean,* 1954, 124 Fed. Supp. 13 (Tr. p. 18-23). In *Baker v. Transocean,*[5] Judge George Harris dismissed an action brought on the law side of the court for want of jurisdiction, relying on Judge Goodman's opinion in the *Wilson* case. Judge Oliver Hamlin likewise ordered two actions dismissed, because not commenced in admiralty, in the cases of *Wheeler v. Transocean*[6] and *Garrison v. Transocean.*[7]

Thus in all reported cases, save for a line of cases originating in New York and now repudiated even there in the latest case from that area[8], the courts have held, in accord with the plain wording of the Act and its legislative history, that the right of action created must be enforced in the prescribed forum, in admiralty.

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[5]No. 33265 (Civil) in the United States District Court, Northern District of California, Southern Division, Order of Dismissal dated May 12, 1954.

[6]No. 33267 (Civil) in the United States District Court, Northern District of California, Southern Division, Order of Dismissal dated June 14, 1954.

[7]No. 33250 (Civil) in the United States District Court, Northern District of California, Southern Division, Order of Dismissal dated June 8, 1954.

[8]*Iafrate v. Compagnie Generale Atlantique,* S.D.N.Y., 1952, 106 Fed. Supp. 619, discussed above.

IV.

THE ARGUMENT BY APPELLANT THAT THE WORD "MAY" IS "PERMISSIVE" RATHER THAN "MANDATORY" IS A FALSE ISSUE.

Appellant argues that the word "may" as used in Section 1 of the Act should be given "its usual discretionary meaning" and be held to be "permissive" only, and that to hold that the action may only be brought in admiralty would be to construe the word "may" as "mandatory." Had that been desired, so appellant argues, the word "shall" would have been used.

In our opinion, this injects a completely false issue. In one sense, of course, the word "may" is used in the statute in a permissive sense: the claimant "may" sue, if he so elects; if he does not wish to sue, he need not. It would be manifestly inappropriate for Congress to say that "*whenever* the death of a person shall be caused by wrongful act . . . the personal representative of the decedent" *shall* (that is, must) sue. The option afforded the claimant, however, is the option to sue, not an option as to where suit may be brought; as to that, Congress says most explicitly the suit "may be maintained . . . *in admiralty.*"

Contrary to appellant's suggestion, appellee is not trying to limit jurisdiction "by implication"; rather, it is appellant who is trying to insert into the Act words which are not there, to amend it to read "may maintain an action . . . in admiralty [or in any other court of general jurisdiction]"; appellant seeks to

infer the inserted language all from the one word "may".

Appellant argues that where Congress intended to grant no option, Congress used the word "shall"; to "prove" this, appellant refers to other sections of the Act itself, and to neighboring sections of Title 46 of the U. S. Code.

This test of resort to comparable sections of the Act and related statutes is a fair one, but it does not support appellant. Thus, Section 3 of the Act (46 U.S.C.A. Section 763) refers to "securing jurisdiction of the vessel, person, or corporation sought to be charged" and clearly contemplates an action only in admiralty. Section 4 (46 U.S.C.A. Section 764), dealing with causes of action created by foreign law, again refers to the maintenance of a right of action "in an appropriate action *in Admiralty* in the Courts of the United States . . . ." Section 5 (46 U.S.C.A. Section 765), authorizing the substitution of a personal representative in the event an injured claimant dies pending suit, specifically says: "If a person die as the result of such wrongful act, neglect, or default as is mentioned in Section 761 of this Title *during the pendency in a Court of Admiralty* of the United States of a suit to recover damages for personal injuries . . . ."; had Congress thought suits under the Act could be brought in non-admiralty courts, there would have been no reason to so limit the right of substitution to admiralty cases. It is significant likewise that Section 766, providing that contributory

negligence does not bar recovery but instead simply reduces its amount, states a typical Admiralty rule.

It is instructive to test the challenge of appellant (that the word "may" cannot be used in what he characterizes as a "mandatory" sense) by applying it to the very sections appellant has chosen to refer to,[9] namely, section 2 (46 U.S.C.A. 742) of the Act entitled "Suits in Admiralty By Or Against Vessels Or Cargoes of U.S." and Section 1 (46 U.S.C.A. Section 781) of the act entitled "Suits in Admiralty Against U.S. for Damages Caused By and For Towage or Salvage Services." Section 742 provides:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, *a libel in personam may be brought* against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation." (Emphasis added)

The words "a libel in personam *may* be brought against the United States" almost exactly correspond to the words of the section here in question (save that in our case, the words "in admiralty" are *expressly* added). Could appellant contend that the word "may" in this section is "permissive", and that a claimant, at his option, may bring a "libel in per-

[9]At p. 20 of his Opening Brief.

sonam" in a State court or on the law side of a federal court? The question answers itself.[10] See also Sections 781 and 783:

> "§ 781. A *libel in personam in admiralty may be brought* against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* that the cause of action arose after the 6th day of April, 1920."
>
> "§ 783. In the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, *may* file *a cross libel in personam* or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: . . ."

Here likewise "a libel in personam in admiralty *may* be brought against the United States . . ." and, if the United States file a libel in rem or in personam in admiralty, "the owner of such vessel . . . *may* file a cross-libel in personam . . ." Would appellant contend that in these sections, which he himself has argued are *in pari materia,* a decision that the "libel in personam in admiralty" there authorized could

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[10]Lest appellant in desperation argue that Section 742 *can* be construed to authorize an action at law, we refer to *Johnson v. U. S. Shipping Board,* 1930, 280 U.S. 320, holding that the remedy under that section lies exclusively in admiralty.

properly be brought *only* in an admiralty court would improperly construe the word "may" as "mandatory"?

The above shows that this entire argument is a false issue. Section 761 corresponds to Section 742 and Section 781 in both form and meaning. All three sections use the word "may", and clearly all three contemplate only actions in admiralty.

If further example be needed, the most obvious that comes to mind is that afforded by the antitrust laws of the United States. Section 4 of the Clayton Act[11] (15 U.S.C.A. Sec. 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue therefor in any district court of the United States* in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731." (Emphasis added.)

Nothing is clearer than that the courts have held that this section authorizes *only* suits in the Federal courts, and that these courts have *exclusive* jurisdiction of antitrust treble damage suits. See *General Investment Company v. Lake Shore and M. S. R. Co.*, 1922, 260 U. S. 261; *D. E. Loewe & Co. v. Lawlor*,

[11]Following the wording of Section 7 of the Sherman Act as originally enacted (26 Stat. 210).

Circuit Ct., D. Conn. 1904, 130 Fed. 633; *Freeman v. Bee Machine Co., Inc.,* 1943, 319 U.S. 448.

Appellant further argues that "jurisdiction of federal courts is not to be construed as being exclusive by implication only", and in support thereof cites three cases, *Galveston H. & S. R. Co. v. Wallace,* 223 U.S. 481, *U.S. v. Bank of New York and Trust Co.,* 296 U.S. 463, and *Castle & Cook Terminals v. Local 137,* etc., 1953, U. S. District Court of Hawaii, 110 Fed. Supp. 247.

These cases, however, do not remotely deal with the problems here involved, and the language quoted from them by appellant is in each case torn from its context. Thus, the *Wallace* case involved a suit in a state court for failure to deliver goods by an interstate carrier. The defendant argued that jurisdiction over complaints made by persons alleging they were damaged by a "violation" of the Interstate Commerce Act lay exclusively in the Federal Court, in view of Section 8 of that Act which, as summarized by the Supreme Court, provided that "persons damaged by a *violation* of the statute 'might make complaint before the commission . . . or in any district or circuit court of the United States' " (emphasis by the Supreme Court). Defendant further argued that an earlier Supreme Court opinion supported that contention. The Court, however, distinguished that earlier case and Section 8 from the case before it on the ground that "damage caused by failure to deliver goods is in no way traceable to a *violation of the statute,* and is not, therefore, within the provisions

of § 8 and 9 of the act to regulate commerce" (223 U.S. 481, at 490). The Court, thus, did not—as appellant says—construe the language "might make complaint in the United States District Court" but instead held that that section was *not involved.* The action involved was one for failure to deliver freight entrusted to a carrier, and was not one *created* by Federal statute and not previously existing; the Court simply held that the enactment of a Federal statute did not oust the State courts of jurisdiction which they had already had to enforce independently existing causes of action.

In view of the completely different factual situation and legal issues presented, it is surprising that appellant should cite *U. S. v. Bank of New York & Trust Company.* In that case, the New York State Insurance Commissioner, acting pursuant to State statute, had in a State judicial action taken possession and control of the assets of certain Russian insurance companies, and was in the process of administering these assets and paying off claims against them. It appeared that in the case of certain of the companies, numerous claims had been filed in the State proceeding and were still pending. The United States, relying upon an assignment from Soviet Russia executed in 1933, brought an action in a Federal District Court for an accounting and delivery of these funds to it. The defendants moved to dismiss, relying on the fact that the State court had first assumed jurisdiction as to these assets. The Supreme Court affirmed the dismissal, holding the Government's suit was in rem

and that the State court had first assumed jurisdiction in rem. The Government then argued that it was the plaintiff and was entitled to sue in its own courts, under the provision of the Judicial Code granting the United States District Court jurisdiction for suits by the Government. It was in answer to this contention that the Court used the language quoted by appellant,[12] the Court pointing out that the section conferring jurisdiction in the Federal District Court to entertain suits by the Government did not purport to be exclusive, and that the United States did have power to sue in the State court. The Court held the District Court had properly exercised its discretion in declining to exercise jurisdiction in the particular case, in view of the fact that the State court had already acquired jurisdiction of the res in question, that the claims of many claimants were still pending in the State court, that these claimants would have been indispensable parties to any disposition of the fund by the Federal Court, and that to so remit the United States to the State court would not make it a "defendant" there, since it would be in the State court solely to assert an affirmative claim. How this case supports appellant's position, we do not see.

Castle & Cook Terminals v. Local 137, U.S. Dist. Ct., Hawaii, 1952, 110 Fed. Supp. 247, is likewise not in point. That was an action against a labor union for breach of contract, brought in a territorial court. Defendant apparently tacitly admitted such rights of

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[12]At p. 19 of Appellant's Opening Brief.

action had traditionally existed, but sought to remove the case to the District Court, arguing that the Taft-Hartley Law now authorized such action, and that Congress had "fully occupied" the field, so that the remedy *now* was exclusively federally created. The court granted a motion to remand, indicating that no intention to exclusively occupy the field and abrogate previously existing State remedies could be inferred from the statutory language, and in this connection used the language appellant quoted. The holding of the case is thus based on the *existence of a State-created remedy;* there is not even a contention in this case that such a remedy exists.

V.

THE "SAVING TO SUITORS" CLAUSE OF THE JUDICIAL CODE IS IN NO WAY INVOLVED IN THIS CASE.

The right to recover for wrongful death, either on land or on the high seas, is purely statutory; there was no common law right of action to recover for a death on the high seas. *The Harrisbury,* 119 U.S. 199. It was to remedy this condition that in 1920 Congress enacted the Federal Death on the High Seas Act (46 U.S.C.A. Sections 761-767). In his complaint, plaintiff alleged facts bringing his case within that Act.[13] Plaintiff's right to recover is thus based solely

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[13]Plaintiff's complaint, paragraph VI, Tr. p. 6:

". . . and while on the high seas, about 300 to 400 miles out of Wake Island in the direction of Hawaii, said plane fell and crashed into the Pacific Ocean."

on this Federal Act; no other basis for recovery has been or could be alleged. This sole reliance on the Death on the High Seas Act is both explicit and implicit in appellant's Opening Brief.

In view of this fact, it can be seen that the "saving to suitors" clause[14] does not bear on this case. The "saving" clause is simply that: "it *saves*" (that is, preserves) to suitors "all other [existing] remedies to which they are *otherwise* entitled". It, in itself, *creates* no new remedies at all. In this case the sole remedy is the Federal Death on the High Seas Act. No other remedies existed, and thus there were no "other remedies" to be "saved". We believe the matter is as simple as that.

The cases cited by appellant in support of the supposed proposition that the "saving" clause in some way confers jurisdiction upon State courts and the law side of Federal courts to enforce rights of action which they otherwise could not enforce, do not support that proposition.

Thus, *Madruga v. Superior Court,* 1954, 346 U.S. 556, involved an action to partition a vessel brought in a State court. It was not denied that in general the State court had jurisdiction to hear and deter-

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[14]28 U. S. C. A. Section 1333:

"Admiralty, maritime and prize cases.

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*"

mine partition suits, but defendant contended that the ship was a "maritime object" and that this fact in some way defeated the general jurisdiction of the State court and conferred exclusive jurisdiction in admiralty. The Supreme Court rejected this contention and, in so doing, used the language quoted by appellant.[15] The *Madruga* case thus does not remotely support the proposition appellant seeks to draw from it. It would be similar to our case only if: (1) the right to partition had *not* existed under State law, (2) such right was first *created* by an Act of Congress (3) which expressly required enforcement in an admiralty court.

Likewise irrelevant is *Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, where, in an action brought on the law side of the Federal court, it was held that the doctrine of unseaworthiness applied in favor of stevedores, as well as seamen. Defendant shipowner had urged "that the *doctrine* of unseaworthiness is peculiar to admiralty and cannot be applied in a suit brought on the law side of the court" (328 U.S. 85, at 88, emphasis added), and it was in answer to this contention that the court used the language quoted by appellant.[16] Thus, the *Sieracki* case likewise was not a case of the court enforcing "at law" a statutory cause of action, *created* by a statute expressly providing that it be enforced in admiralty; no statute

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[15]At pp. 7-8 of Appellant's Opening rBief.

[16]At p. 8 of Appellant's Opening Brief.

of any kind was involved. The court simply applied in a case at law brought by a stevedore a *doctrine* hitherto recognized in admiralty situations in the case of seamen.

In *Pope and Talbot, Inc. v. Hawn,* 1953, 346 U.S. 406, the court applied the Sieracki doctrine in an action at law brought by a carpenter against a shipowner. No challenge was made to the jurisdiction of the court; rather, the defendant urged that the *State substantive* law of contributory negligence should be applied. This contention was rejected by the Court, which pointed out the plaintiff was suing, not on a claim created by State law, but on a "maritime tort" "rooted in federal maritime law" (346 U.S. 406, at 409), and in this connection used the language quoted by appellant.[17] The case is in no way similar to ours.

Hall-Scott Motor Car Co. v. Universal Ins. Co., 1941, 122 Fed.(2d) 531 was a suit at law against a bailee, to recover the value of property destroyed while in the bailee's possession, the bailee relying upon a waiver of liability clause in the bailment contract. The court held that the contract was a "maritime contract", being for the repair of a vessel, and that its validity was to be determined by admiralty principles, rather than by state law. Here again, the cause of action sued on was not created by a statute

[17]At p. 10 of Appellant's Opening Brief.

but has long been within the jurisdiction of law courts. The case is not remotely in point.

Appellant did not feel the remaining cases he cited in this connection (at p. 9 of his Opening Brief) merited discussion, nor do we. None of them involve factual situations or legal issues at all parallel to this case.

The above demonstrates we are left where we were. Appellant has cited no authority holding that the "saving to suitors" clause in any way *creates* any new rights to sue in State courts or in actions at law in federal courts. The "saving" clause adds nothing, and might as well never have been mentioned.

CONCLUSION.

The above has demonstrated that the only issue in this case is the proper construction of Section 1 of the Death on the High Seas Act; that its plain wording and legislative history show that actions thereunder must be brought in admiralty; that this conclusion is supported by a decision of this Court, and several recent opinions of District Courts in this Circuit, as well as the better reasoned cases elsewhere; that the only contrary authority originated in New York, but the latest decision from New York repudiates that result, and follows the holdings in this Circuit; that this conclusion is fortified by the examination of comparable statutes; and that the "saving to suitors" clause is not involved.

In view of the above, the judgment of the trial court, dismissing the action for want of jurisdiction, should be affirmed.

Dated, San Francisco, California,
April 11, 1955.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

EXTRACT (pp. 93-98) FROM OPINION OF JUDGE GOODMAN IN WILSON v. TRANSOCEAN, U.S. DIST. CT., N.D., CAL., 1954, 121 FED. SUPP. 85:

"...

Since the federal Death on the High Seas Act affords a right of action for the death of plaintiff's husband, and that right is exclusive, the cause was properly removed to this court, if the Superior Court had jurisdiction to entertain it. Although the parties did not question the jurisdiction of the state court to entertain a suit under the Death on the High Seas Act, this court raised the question since it appeared to the Court from the language of the Act, that exclusive jurisdiction to entertain a suit under the Act was vested in the federal courts of admiralty. At the Court's request, the parties briefed the question with the result that defendant now contends that a suit under the Death on the High Seas Act lies solely within the admiralty jurisdiction, while plaintiff urges that the right given by the Act may also be enforced in a suit at law in the state or federal courts. If plaintiff is correct, the removed action could proceed in this court as a suit at law with right of trial by jury.[33] If defendant is correct, the action must be dismissed, inasmuch as this court acquired no jurisdiction by the removal of the action if the state court

[33]If, of course, the complaint were amended to state that the action was brought by the plaintiff in the capacity of the decedent's personal representative.

had no jurisdiction to entertain it.[34] Such dismissal would, of course, be without prejudice to the filing of a new suit in admiralty, by the decedent's personal representative.

On its face, the language of the Death on the High Seas Act seems quite clearly to grant exclusive jurisdiction of actions under the Act to courts of admiralty. Section 1 of the Act provides as follows:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Thus, in a single sentence the statute both creates a right of action, which did not previously exist, and stipulates that the right is to be enforced in the federal courts of admiralty. The provision that enforcement is to be in admiralty is a limitation on the right itself.

Plaintiff urges that the use of the permissive expression 'may maintain a suit . . . in admiralty' is

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[34]General Investment Company v. Lake Shore & Michigan Southern Railway Company, 260 U.S. 261, 288 (1922); Lambert Run Coal Company v. Baltimore & Ohio Railroad, 258 U.S. 377, 382 (1922).

indicative of Congressional intent to *offer* the admiralty forum rather than to *withhold jurisdiction* from the courts of law. Such intent, plaintiff asserts, would be consistent with the general federal legislation saving to suitors the privilege of availing themselves of common law remedies for the enforcement of maritime rights.[35]

But, this construction of Section 1 overlooks the fact that the word 'may' is not employed to designate a permissible forum but to grant a right of action. The statute says that the personal representative of the decedent 'may maintain a suit.' By these words the statute gives a right of action where none existed before. The use of a mandatory word such as 'shall' in this context would have been entirely inappropriate. The remainder of the sentence designating the forum is a qualification of the permission to maintain a suit.

Moreover, the construction offered by plaintiff would render the words 'in admiralty' mere surplusage. Yet, as plaintiff, herself, notes, 'no rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded every word in a statute.'[36] No express permission would have been necessary merely to open the courts of admiralty for the enforcement of the maritime right

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[35]1 Stat. 76 (1789); Rev. Stat. §711 (1875); 28 USC §1333 (1948).

[36]Plaintiff's supplemental brief 5, quoting from Chambers v. Robertson, 183 F. 2d 144, 148 (App.D.C. 1950).

created by the statute. A suit to enforce a maritime right is a case within the admiralty jurisdiction. The District Courts of the United States have original jurisdiction of 'any civil case of admiralty or maritime jurisdiction.' 28 USC 1333.

Other language of the Death on the High Seas Act is also persuasive that suits under the Act are exclusively within the jurisdiction of the admiralty courts. Section 5 of the Act provides that:

> 'If a person die as a result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 2 of this Act.'

If the Congress contemplated that suits enforcing the right of action given by the Death on the High Seas Act should be maintained in courts of law, there would have been no reason to limit the right of substitution granted in Section 5 of the Act to suits for personal injuries which were pending in the admiralty courts.

But it is unnecessary to rely solely on the statutory language for support for the conclusion that the right of action granted by the Death on the High Seas Act may be maintained only in admiralty. Both the Committee reports of the 66th Congress which enacted

the statute as well as the debate on the floor of the House make it clear that the framers of the Act intended to vest exclusive jurisdiction in the courts of admiralty. See Senate Report 216, House Report 674, 66th Congress; Vol. 9 Congressional Record, Part 5, pp. 4482-4486, 66th Congress.

It is also significant that the earliest decisions ruling upon the question of the forum in which the right of action granted by the Act should be enforced stated categorically that the suit must be in admiralty. [See Dall v. Cosulich Line, 1936 A.M.C. 359 (S.D.N.Y. 1928);[37] Birks v. United Fruit Co., 48 F. 2d 656 (S.D.N.Y. 1930); Echavarria v. Atlantic & Caribbean Steam Nav. Co., 10 F. Supp. 677 (E.D.N.Y. 1935); The Mohawk, 1938 A.M.C. 396 (Surrogates' Court of Kings County New York 1938).]

Indeed, the matter would seem too clear for question were it not for a line of cases which, beginning in 1938, some 18 years after the passage of the Act, have permitted suits under the Act at law. The first of these cases was Elliott v. Steinfeldt, 4 N.Y.S. 2d 9 (1938) in which the Appellate Division of the Su-

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[37]In the Dall case, the plaintiff in a suit at law asserted both a right of action founded on Italian law and the right of action given by Section 1 of the Death of the High Seas Act. The Court dismissed the complaint, holding that neither right of action could be maintained because the Italian law was not pleaded and because the right of action given by the Death on the High Seas Act could be enforced only in admiralty. Consequently, this decision constitutes a ruling on the forum in which the Section 1 right of action must be enforced, and should be distinguished from those cases involving the forum in which a foreign right of action may be enforced under the provisions of Section 4 of the Death on the High Seas Act. See note 40 *infra*.

preme Court of New York reversed a judgment of the trial court dismissing for want of jurisdiction an action at law under the Death on the High Seas Act. In a brief memorandum opinion the appellate court stated that: 'The Federal Death on the High Seas Act supersedes the state death statute, in so far as it creates and defines substantive rights arising out of wrongful death on the high seas. But the right to maintain the action in the state courts, which had long existed under the Judiciary Act of 1789 was not necessarily affected by the federal statute. Concurrent jurisdiction in federal and state courts to enforce rights granted by federal law is not uncommon. Where the state courts have long enjoyed jurisdiction over the subject matter of an action, jurisdiction is not withdrawn by federal statute unless such an intention is distinctly manifested. No such intent is discernible here.' This line of reasoning is founded on the faulty premise that the state courts of law had long enjoyed jurisdiction to enforce the federal right of action for wrongful death. The only right of action for death on the high seas which the state courts had ever enforced was such right as had been created by state statute. And the state statutes had been applied to deaths on the high seas in only a few scattered cases.[38] The issue is not whether the federal statute

[38]For cases, in addition to the three previously referred to, in which a state wrongful death statute was applied to a death occurring on the high seas, see: International Nav. Co. v. Lindstrom, 123 Fed. 475 (2 Cir. 1903); Southern Pacific Co. v. De Valle Da Costa, 190 Fed. 689 (1 Cir. 1911); Souden v. Fore River Shipbuilding Co., 223 Mass. 509, 112 N.E. 82 (1916); The James McGee, 300 Fed. 93 (S.D.N.Y. 1924).

purports to *withdraw* any pre-existing jurisdiction from the state courts, but whether the statute *withholds* from the state courts jurisdiction of an entirely new right of action.

The New York courts accepted jurisdiction of subsequent suits at law under the Death on the High Seas Act without further consideration, in reliance on the Elliott decision. See Murphy v. Steinfeldt, 4 N.Y.S. 2d 10 (1938); Colbert v. Steinfeldt, 7 N.Y.S. 2d 373 (1938); Kristansen v. Steinfeldt, 9 N.Y.S. 2d 790 (1939); Wyman v. Pan American Airways, Inc., 1941 A.M.C. 912, aff'd 30 N.Y.S.2d 816 (1941).

In 1941, Judge Clancy in the United States District Court for the Southern District of New York, denied a motion to dismiss a suit at law under the Death on the High Seas Act, stating that the Act creates a right which may be asserted in a common law action. Choy v. Pan-American Airways Company, 1941 A.M.C. 483. Judge Clancy appears to have been largely persuaded by the decision of the Supreme Court in Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924), interpreting the Jones Act which had been enacted some three months after the Death on the High Seas Act. In that case, the Supreme Court held that the right of action given to seamen by the Jones Act might be enforced in admiralty although the Act merely provided that the right of action might be maintained in a suit at law. In referring to the Panama R.R. Co. case, Judge Clancy states that: 'While that case presented the converse of the problem before us, much of its argument is

apropos here. The Jones Act gives seamen a right to recover for wrongful death. It, and the Death on the High Seas Act, were enacted by the same Congress and it would appear to be anomalous to hold that seamen had a common law action for death and other victims of injuries on the same ship had not.'

In my opinion, the Supreme Court decision in Panama R.R. Co. v. Johnson, interpreting the Jones Act, is an unreliable guide to employ in interpreting the Death on the High Seas Act. This is so because the Supreme Court's interpretation of the Jones Act was admittedly restricted by the necessity to avoid, if possible, a grave constitutional question. Happily the present problem in interpreting the Death on the High Seas Act is not complicated by any such restriction. Nor do I regard it as anomalous that the Congress which enacted the Death on the High Seas Act would enact another statute according the dependents of seamen a wider choice of forums in which to maintain an action for wrongful death. Traditionally different remedies have been available to seamen than to others suffering a maritime wrong. There are other differences between the remedies afforded by the Death on the High Seas Act and the Jones Act in addition to the difference in the permissible forums.[39]

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[39]The Jones Act designates alternate beneficiaries; the Death on the High Seas Act provides for apportionment of the recovery among all the designated beneficiaries. The Jones Act prohibits certain defenses which the Death on the High Seas Act does not.

The two statutes had entirely different and distinct histories.[40]

In a later case in the United States District Court for the Southern District of New York Batkiewicz v. Seas Shipping Co., 53 F.Supp. 802 (1943), Judge Hulbert relied upon Judge Clancy's decision as well as the Elliott case, *supra,* in holding that an action under the Death on the High Seas Act could be joined with an action at law under the Jones Act.

The third federal decision upholding the jurisdiction of a court of law to entertain a suit under the Death on the High Seas Act also relies for support on the previous decisions. Sierra v. Pan-American World Airways, Inc. 107 F. Supp. 519 (Puerto Rico 1952).

Bugden v. Trawler Cambridge, Inc., 65 N.E.2d 533 (Mass. 1946) is cited as supporting the conclusion that actions for death under the Death on the High Seas Act may be maintained at law. In that case the court said: 'The bill of exceptions states that the action is brought under the Jones Act, and under the death on the high seas act. It is settled that actions may be brought in State Courts under the Jones Act. And it has been held that because of the Judiciary Act of 1789, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," actions to recover damages under the death on the high seas act may be brought in State courts. Elliott v. Steinfeldt, 254 App. Div.

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[40]See Willock, "Commentary on Maritime Workers," 46 USCA preceding 688 p. 211 (1944) for the history of the Jones Act.

739, 4 N.Y.S.2d 9, Batkiewicz v. Seas Shipping Co., Inc. D.C., 53 F.Supp. 802. For the purpose of deciding the single question here presented it is enough if the case is properly before us under either of these acts.' Since the Massachusetts court unquestionably had jurisdiction of the suit under the Jones Act, this decision in no way constitutes an approval of the Elliott or Batkiewicz decisions.

Powers v. Cunard S.S. Co. Ltd., 32 F.2d 720 (S.D. N.Y. 1925) and The Saturnia, 1936 A.M.C. 469 (S.D. N.Y. 1936) are also referred to as supporting the view that the right of action granted by the Death on the High Seas Act may be enforced in a common-law court. But, in both of these cases the right of action asserted was created by foreign law. The court merely held that Section 4 of the Death on the High Seas Act which states that suit may be maintained in the federal courts of admiralty upon a right of action for death created by a foreign State without abatement in respect to the amount for which recovery is authorized, does not preclude a suit at law on the foreign right of action.[41] This is a very different question than

[41]Section 4 of the Death on the High Seas Act provides that: "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding." Prior to the Death on the High Seas Act, any right of action for death on the high seas granted by foreign law could have been enforced in the state or federal courts of the United States either in suits at law or admiralty, but such suits were subject to the Limitation of Liability Statutes of the United States, 46 USC Sec. 183, et seq., The Titanic, 233 U.S. 718 (1914).

whether suit may be brought at law on the federal right of action created by Section 1 of the Act.

This brief resume of the decisions asserted to support the view that the right of action given by the Death on the High Seas Act may be maintained at law demonstrates that only the five decisions in the state courts of New York and three of the federal decisions are holdings to this effect. Of these eight decisions only two are predicated upon independent reasoning of the court. This reasoning, as has been noted, I do not find persuasive. My belief as to the unsoundness of these decisions is strengthened by the decision of Judge Weinfeld in Iafrate v. Compagnie Generale Transatlantique, 106 F.Supp. 619 (S.D.N.Y. 1952) in which he reaches the same conclusion. It is noteworthy that Judge Weinfeld is a member of the United States District Court for the Southern District of New York where two of the contrary decisions were rendered.

I hold that the sole right of action for the death of plaintiff's husband is that granted by the Death on

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Section 4 of the Death on the High Seas Act provides a procedure by which the foreign right of action may be enforced in admiralty without having the recovery diminished by the Limitation of Liability Statutes. Powers v. Cunard S. S. Co. and the Saturnia merely held that Section 4 did not preclude the enforcement of a foreign right of action in a suit at law, but apparently the Limitation of Liability Statutes would still apply to such a suit. Other cases have held that if a person asserting a foreign right of action for wrongful death wishes to avoid the Limitation of Liability Statutes by invoking Section 4 of the Death on the High Seas Act, the procedure set forth in that Section must be followed and the suit must be in admiralty. See The Silverpalm, 79 F. 2d 598 (9 Cir. 1935); Egan v. Donaldson Atlantic Line, 37 F. Supp. 909 (S.D.N.Y. 1941).

the High Seas Act, and that this right must be maintained in admiralty. Since the Superior Court of California had no jurisdiction to entertain the suit at law for the death of plaintiff's husband, this court could not acquire jurisdiction by removal. The action must therefore be dismissed without prejudice to the filing of an action in admiralty by the decedent's personal representative.

Dated: April 15, 1954."